No. 10-17-00029-CV

IN THE COURT OF APPEALS
FOR THE TENTH DISTRICT OF TEXAS

SANDRA K. BULLARD
Appellant

V.

REBECCA ANN STIFFLEMIRE AND LARRY STIFFLEMIRE
Appellees

On appeal from the 21st District Court
of Burleson County, Texas
Cause No. 28-310

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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SUPPLEMENTAL STATEMENT REGARDING ORAL ARGUMENT

This case presents important issues regarding the scope and applicability of the Texas Property Code's consumer protections intended to protect buyers under a Contract for Deed. Oral argument would materially aid in the parties' submissions on these issues. Oral argument would allow additional analysis of the Texas Property Code's statutory protections, which Appellant submits is significant to the jurisprudence of this Court.

SUMMARY OF APPELLANT'S REPLY

Appellant's Reply Brief is made to address and correct three mistakes of law submitted by Appellees.

First, Appellees submit that the trial court's conclusion can be affirmed under theories of estoppel or waiver. That is incorrect. The trial court's Findings of Fact and Conclusions of Law recited the basis for its judgment—that the contract for deed "lapsed." The trial court's findings define and limit the issues on which this judgment may be reviewed. The judgment may not be supported on other grounds or defenses which are absent in the trial court's findings. Accordingly, these theories are inapposite to this Court's review.

Second, Appellees submit that the Contract for Deed was unenforceable under a theory of failure of consideration. Even considering this theory (that is contained nowhere within the trial court's findings or conclusions), there is no legal or factual basis on which to sustain the conclusion that Bullard's failure to make a payment constituted a *total* failure of consideration, warranting cancellation of the Contract for Deed.

Third, allowing cancellation of the Contract for Deed, whether under a theory of "lapse" or "failure of consideration," is in contravention of the express language of the Texas Property Code and legally incorrect.

This case turns on a single, central issue: whether a seller under a contract for deed can obtain the result of cancellation and forfeiture without first complying with the requirements of the Texas Property Code by simply declaring that the agreement has lapsed.

The Stifflemires seek to avoid this central question. Rather, they argue that such a result can stand based on *other* theories, theories that are contained nowhere within the trial court's actual reasoning.

After dispelling these theories as inapposite and incorrect, this Court must address this critical question. Bullard submits that such an outcome is wrong. Allowing a seller to cancel the agreement and declare all amounts forfeited without first complying with the statutory protections is contrary to the express language of the Property Code and defeats the very purpose of the protections, to protect buyers from unscrupulous sellers. Accordingly, reversal of the trial court's judgment is warranted.

ARGUMENT AND AUTHORITIES

I. Theories of Estoppel and Waiver are Inapplicable to this Court's Review.

Appellees submit that the trial court's conclusion that the Contract for Deed "lapsed" may be affirmed under theories of estoppel or waiver. Appellee's Brief, p. 9. As support for this contention, Appellees recite that "conclusions of law are upheld if the judgment can be sustained on any legal theory the evidence supports." *Id.*

Appellees, however, omit the actual requirements for application of this legal principle. Upon examination, it is evident that this rule has no application in this case. This Court's review is defined and limited by the trial court's actual findings and conclusions, which exclude Appellees' theories of estoppel and waiver.

In the absence of express findings of fact, the appellate court is required to presume that the trial court's implied fact findings were in accordance with and in support of its judgment. *See, e.g.*, *Seaman v. Seaman*, 425 S.W.2d 399, 341 (Tex. 1968). However, when findings of fact are filed by the trial court, this presumption disappears. TEX. R. CIV. P. 299 (stating that when findings of fact are filed by the trial court, the findings form the basis of the judgment which "may not be

supported on appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact").

Accordingly, when a trial court files findings of fact and conclusions of law, those findings define and limit the issues on which the judgment may be reviewed. *Id.*; *see Westminster Falcon/Trinity L.L.P. v. Shin*, No. 07-11-0033-CV, 2012 Tex. App. LEXIS 8833, at *10-11 (App.—Amarillo Oct. 23, 2012, no pet.) ("When findings of fact are obtained, they define and limit the issues upon which an appellate court can affirm."), *citing Williams v. Gillespie*, 346 S.W.3d 727, 732 (Tex. App.—Texarkana 2011, no pet.).

The judgment may not be supported on appeal by a presumed finding on any ground of recovery or defense, no element of which has been included in the court's findings. TEX. R. CIV. P. 299; *see also*, *Uhlhorn v. Reid*, 398 S.W.2d 169, 176 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

Even if other grounds were pleaded, if the findings rely on one ground, there may be no implied findings dealing with the other pleaded grounds of recovery or defense *Leonard v. Eskew*, 731 S.W.2d

124, 132–133 (Tex. App.—Austin 1987, writ ref'd n.r.e.) ("because the trial court judgment rests upon the specific grounds set out in the findings of fact and conclusions of law that accompany the judgment" the reviewing court is "not permitted to assume omitted findings or conclusions necessary to any other grounds for the judgment even though such grounds may be pleaded in the case."); *see also E.F. Hutton & Company, Inc. v. Fox*, 518 S.W.2d 849, 856 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

The primary reason an appellant requests findings of fact is to avoid implied findings so that fewer points of error will be necessary in prosecuting the appeal. Presently, despite that the trial court's Findings of Fact and Conclusions of Law made no findings or conclusions regarding estoppel or waiver, Appellees nonetheless attempt to invoke them as grounds for upholding the trial court's judgment.

The trial court's Findings of Fact and Conclusions of Law rest upon specific grounds that "the Contract for Deed lapsed on May 1, 1995, because Bullard failed to make the $20,000 payment . . ." (CR 368-370). The trial court's holding contains no findings or conclusions to support theories of estoppel or waiver.

The trial court made no findings to support a defense of estoppel; there are no findings, for example, noting Bullard's adoption of inconsistent positions, or any type of unconscionability that arose as a result of such conduct. Similarly, there are no findings to support a waiver defense, such as a finding reciting that Bullard did intentionally relinquish known rights.

Quite plainly, there are no findings or conclusions which allow review of the trial court's judgment on grounds other than those which were expressly recited. Accordingly, the trial court's judgment may not be supported by any presumed findings upon theories of estoppel or waiver, and this Court's review is limited to the actual grounds of recovery and defenses recited in the judgment, that the Contract for Deed was unenforceable because it "lapsed."

II. Appellee's Theory of Lack of Consideration Cannot Support the Trial Court's Judgment.

A theory of failure of consideration cannot support the trial court's conclusion that the Contract for Deed lapsed. As an initial matter, the trial court's holding, as reflected in the Findings of Fact and Conclusions of Law, makes no reference to a defense of "failure of consideration." (CR 368-370). Accordingly, and for the same reasons

articulated above, the defense of "failure of consideration" is an improper basis of support for the judgment. TEX. R. CIV. P. 299.

Even construing the trial court's language broadly—that lapse is in fact synonymous with "total failure of consideration"—the trial court's conclusion is improper for two reasons. First, there is no basis on which to conclude that there was a total failure of consideration which would allow cancellation of the Contract for Deed. Second, cancellation under this theory is contrary to the express language of the Texas Property Code.

Each of these issues is reviewed *de novo* by this Court. *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996). When performing a *de novo* review, the appellate court exercises its own judgment, and re-determines each legal issue. *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1998).

A. There was no total failure of consideration allowing cancellation of the Contract for Deed.

Failure of consideration occurs when, after the inception of the contract, the plaintiff does not perform a condition precedent to the defendant's duty to perform. *S&H Sup. v. Hamilton*, 418 S.W.2d 489, 492 (Tex. 1967)(Greenhill, J., dissenting). A failure of consideration may

be either partial or total. *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 748 (Tex. App.—Dallas 2012, no pet.).

Failure of consideration is grounds for cancellation or rescission of the contract only where there is a total failure of consideration. *Id., citing Food Mach. Corp. v. Moon*, 165 S.W.2d 773, 775 (Tex. Civ. App.—Amarillo 1942, no writ).

"A partial failure of consideration does not prevent a recovery on the contract." *Huff v. Speer*, 554 S.W.2d 259, 263 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (emph added). Partial failure of consideration does not invalidate the contract, but entitles the injured party to a suit for damages. *Carter v. People Answers, Inc.,* 312 S.W.3d 308, 312 (Tex. App.—Dallas 2010, no pet.).

Total failure of consideration, warranting cancellation or rescission of a contract, occurs where a person receives "nothing whatever of value in exchange for property, or money . . ." *Food Mach. Corp. v. Moon*, 165 S.W.2d at 775.

Distinguishably, where the party accused of breach provides partial performance of its obligations under the agreement, there is no *total* failure of consideration, and any failure of consideration is

considered partial. *See, e.g.*, *Milner v. Boswell,* 377 S.W.2d 763, 764 (Tex. Civ. App.—Fort Worth 1964, no writ).

In this case, both factually and legally, total failure of consideration cannot support the trial court's judgment and serve as a basis for cancellation of the Contract for Deed. The record conclusively establishes Bullard's partial performance of the Contract for Deed.

Bullard made monthly payments under the Contract for Deed from May 1, 1994, through May 1, 1995, and thereafter for more than twenty years. (1 RR 15, 21). Pursuant to the Agreement, Bullard maintained both homeowner's and liability insurance on the Property since May 1, 1994. (1 RR 20). And, pursuant to the Contract for Deed, Bullard deposited $2,500 with a title company in furtherance of purchase of the Property and delivery of the deed (2 RR 4-12), which Defendants received in 1997. (1 RR 23-24, 2 RR 39).

Each of these evinces Bullard's performance under the Agreement, signifying that there was not a *total* failure of consideration. The trial court recited these facts in its Findings of Fact and Conclusions of Law. (CR 368-370). The evidence conclusively established (and the trial court

acknowledged) that there was no total failure of consideration which would allow for cancellation or rescission.

Thus, even indulging Appellees' theory and construing "lapse" as actually meaning "total failure of consideration," the legal conclusion is legally improper and factually unsupported. The trial court has no discretion when determining what the law is, and may not incorrectly apply the law to the facts. *See, e.g., Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Accordingly, both factually and legally, the trial court's judgment warrants reversal.

B. The Stifflemires fail to address their non-compliance with the Texas Property Code's Protections.

There is no legal support for the contention that a contract for deed may simply lapse.[1] Appellees provided no authority which would support such a proposition. Rather, Appellees seek to muddy this point by giving the phrase "lapse" a new name of "failure of consideration." By doing so, they seek to sidestep completely the issue of their own failure to comply with the Texas Property Code.

[1] As noted previously in Appellant's Brief, FN 2, the remedy of forfeiture of the buyer's payments and interest under the contract, is a harsh remedy, not favored by the courts. *See, e.g., T-Anchor Corp. v. Travarillo Assocs.*, 529 S.W.2d 622, 627 (Tex. Civ. App.-Amarillo 1975, no writ).

But, as indicated above, a partial failure of consideration is in its simplest form a default; it results from one party failing to comply with a contractual term. *S&H Sup. v. Hamilton*, 418 S.W.2d at 492. It authorizes the opposing party to seek damages for the default, but it does not allow for cancellation or rescission of the agreement. *Carter v. People Answers, Inc.,* 312 S.W.3d at 312.

Thus, even accepting the Stifflemires proposition that the trial court's use of the phrase "lapse" actually meant "failure of consideration," the Stifflemires fail to provide any legal authority supporting their conclusion that Bullard's default entitled them to the remedy of cancellation and forfeiture without first complying with the Property Code's protections and statutory requirements.

The statute explicitly provides that "a seller may enforce a forfeiture of interest . . . **only after notifying the purchaser of the seller's intent to enforce the forfeiture** . . ." 1993 TEX. PROP. CODE § 5.061 (emph. added). It was undisputed that the Stifflemires failed to comply with the statutory requirement to send notice of default in order to cancel, modify, or accelerate the Contract for Deed. (1 RR 78). (CR 372)

And herein lies the critical omission: the Stifflemires provide no explanation or legal authority to support the trial court's conclusion that Bullard's default entitled them to exercise the remedies of cancellation and forfeiture without complying with the statutory protections.

Thus, whether applying the term lapse, default, or partial failure of consideration, the same conclusion remains: the Stifflemires were unable to obtain the remedy of cancellation and forfeiture without first complying with the Texas Property Code. Accordingly, the trial court's conclusion that Bullard's failure to make the payment resulted in lapse of the Agreement is legally improper and contrary to the express language of the statute. The trial court's judgment is against the express language of the Property Code, and warrants reversal.

CONCLUSION

The Stifflemires rely on theories of estoppel, waiver, and failure of consideration in support of the trial court's judgment. As demonstrated above, these defenses are inapposite to this Court's review, as well as legally and factually improper. The Stifflemires fail to provide any support or legal basis to affirm the trial court's judgment allowing a

seller under a Contract for Deed to obtain the result of cancellation and forfeiture without complying with the protections required by the Texas Property Code. The trial court's holding is contrary to the express language of the Texas Property Code, undermines the protections afforded by the statute, and warrants reversal.

PRAYER

For these reasons, Bullard prays the Court REVERSE the Judgment of the trial court, and remand the case for further proceedings; and, specifically, REVERSE the trial court's denial of statutory damages, RENDER judgment as to liability in Appellant's favor, and remand solely on the issue of the amount of unliquidated damages, to include reasonable attorneys' fees owed to Bullard, through trial, appeal, and remanded proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above Appellant's Reply Brief was served on counsel of record for Appellee through the Court's electronic case filing system on this 7th day of August, 2017.

/s/ Tyler B. Talbert

Tyler B. Talbert

CERTIFICATE OF COMPLIANCE

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